IN THE

Supreme Court of the United States

October Term, 1976

No. 75 - 1541

CHARLES HOFF and CLIFFORD LAGEOLES,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY

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Significantly, the government does not argue that the district court and the court of appeals were correct in refusing to apply the "Larrison" new trial standard to petitioners' motions for a new trial based upon the newly discovered evidence of uncontroverted massive perjury by the only witness to implicate them in criminal wrongdoing. Instead, the government argues: (1) that the petitioners failed to exercise due diligence in not discovering the new evidence at trial; (2) that the choice between the standard applied by the courts below and the Larrison standard is not significant;

and (3) that the new evidence does not warrant a new trial. The government's memorandum in major respects ingnores the record and the findings and analysis of the courts below.

1. The government suggests that the district court found that the petitioners either failed to exercise due diligence in uncovering the evidence of Glasser's perjury, or that, having discovered that evidence, they chose not to use it as a deliberate trial strategy. In fact, the district court specifically abjured just such findings, and decided the new trial issue on its merits. The record supports the district court's holding that petitioners' trial counsel acted in good faith and with due diligence, and that the evidence truly was "newly discovered."

Prior to trial the petitioners moved for discovery of Glasser's bank records in an effort to document their claim that he kept all the money he received from the manufacturers and did not turn any part of it over to the petitioners. The district court denied the discovery motions.

The petitioners also subpoenaed Glasser's tax records for 1967-1972. On the first day of trial, Glasser produced only his 1972 return, claiming to have

destroyed his copies of all the others.[1/] Examination of the 1972 return revealed for the first time the existence of Glasser's small fortune of $120,000 which he testified came from his wife's inheritances.

Petitioners thereupon immediately subpoenaed the records of the bank accounts listed in Glasser's return. Summaries of the records were produced five days before the trial ended. The summaries for two banks were not relevant to the time frame of this case. The summary for the East New York Savings Bank showed deposits of about $38,000 from 1967 to 1970, but it could not be determined whether these deposits were made in cash and represented money received during those years. Since the other two bank accounts revealed frequent

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1/ The government, aware that such subpeonaes had been issued to its star witness, failed to notify defense counsel of Glasser's destruction of his tax returns, and failed to have the originals available as a substitute. Indeed, the government opposed defense counsel's subsequent efforts to require the government to produce the returns.

transfer of funds between accounts, there was no good-faith basis to conclude that the sums in the East New York Savings Bank account were not similar transfers from the Glasser's purported inheritance.

It was only a week after the trial concluded that the complete bank records were produced by the East New York Savings Bank revealing for the first time that the deposits were all in cash. Subsequently, additional evidence revealed further cash deposits in two other banks totalling $19,000. And new evidence held by the government until after petitioners' first new trial motion was denied revealed considerable additional deposits, mainly in cash, totalling nearly $100,000 dating from 1962.

The district court was well aware of the above facts, which are contained in affidavits and documents in the record. While the district court suggested that the "key" to the new evidence may have been in the hands of petitioners' trial counsel at trial, it went on to hold that:

> "this Court is not prepared to say that trial counsel in a complex, demanding case is bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion . . .

> Nor does this Court believe that counsel's inadvertence was deliberate trial strategy as the government suggests. . . ." (Pet. App. 35a) (citations omitted). 2/

The district court's findings and conclusions on these issues, based upon its participation in and observation of the trial, deserve the full and complete respect of this Court.

2. The government is even more disingenuous in arguing that the choice of a new trial standard is "formal rather than substantive" (Govt. Mem. at 9), and

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2/ References to "Pet. App." are to the appendix in the Petition for Writ of Certiorari.

It perhaps is significant that petitioners' chief trial counsel not only is widely recognized and acclaimed as an able and competent trial lawyer, but indeed that recognition extends to the Justice Department itself. Shortly after arguing the appeal in the Second Circuit on behalf of petitioners' co-defendants Stofsky and Gold (petitioners in No. 75-1554), trial counsel accepted appointment as Chief of the Criminal Division of the

in suggesting that the court of appeals based its argument on that analysis. On the contrary, both the district court and the court of appeals took seriously the question of the choice of standards and, indeed, found it to be outcome determinative in the present case. See Pet. App. at 15a-16a, 44a.

The difference between the standards is facially apparent. The so-called "Berry" standard applied by the courts below permits a new trial only when the new evidence probably would result in a different verdict; the Larrison standard applied by the other circuit courts of appeals in contexts such as presented in this case permits a new trial when the new evidence might produce a different result. One does not have to assume that "might" means "an outside chance" (Govt. Mem. at 12) in order to understand that "might" means something quite different

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2 / (Footnote 2 continued)

United States Attorney's Office for the Southern District of New York. It is unlikely that such a position would be offered to one who had failed to exercise "due diligence" in a complicated criminal trial in the Southern District of New York.

than "probably." And, as the district court recognized, there is an important distinction between a different verdict and a different result:

> "In a close case, the difference between "conclusion" or "result" and "verdict" is critical. For instance, in this case it is extremely doubtful that the new evidence would precipitate a "different verdict," that is, an acquittal, in a retrial or the trial just past. But, it is quite possible that it might have swayed at least one juror in the past trial, and thus resulted in a mistrial. That would have been a "different conclusion" as this Court interprets the word." (Pet. App. at 44a).

As with the "due diligence" issue, it is not for this Court to reconsider, at the urging of the government, the findings and conclusions of the courts below that if the Larrison standard is applicable to the present case, then there must be a new trial. The only issue properly before the Court is the legal question of which new trial standard should be applied by the federal courts when newly discovered evidence uncon-

trovertibly proves that the only witness to implicate the defendants at trial committed massive perjury on a material issue. As we have shown, the court of appeals applied a standard materially different from that applied by every other federal court of appeals, and by this Court in Mesarosh v. United States, 352 U.S. 1. The writ should issue to decide the important question raised by that conflict.

3. Finally, the government argues that the nature of the new evidence does not require a new trial by the Berry standard, again avoiding the question of the propriety of that standard in the present case. While petitioners submit that the new evidence requires a new trial by either standard, surely the courts below were correct in their view that if Larrison applies there must be a new trial.

The case against Hoff and Lageoles turned entirely on the question of Glasser's credibility. At the trial the prosecutor and judge repeatedly emphasized this crucial aspect of the case. Thus the prosecutor insisted upon offering the testimony of Mrs. Glasser, which was merely corroborative of Glasser's testimony with respect to the source of his wealth, on the government's direct case immediately after Glasser's testimony, arguing that the question of the

source of the wealth was "a central one" in the case. (App. 178a). 3/ Mrs. Glasser's testimony undoubtedly greatly supported Glasser's credibility with the jury.

In his summation, the Assistant United States Attorney stressed his view that there was no apparent motive for Glasser to lie on any aspect of his testimony and, indeed, that lying was the only way in which Glasser could incur liability because of his grant of immunity (627a). 4/ And the court's

3/ References to "App." are to pages in the joint appendix in the court of appeals, a copy of which has been lodged with the clerk of this Court.

4/ At the end of the trial, defense counsel discovered and introduced probate records showing that Mrs. Glasser had inherited no more than $3,000 from her parents. The United States Attorney attempted to explain away the discrepancy in the Glassers' testimony created by the introduction of the probate records by suggesting that Mrs. Glasser "inherited" the money from her parents by means other than directly through the estate, such as inter vivos gifts, trusts, or "under the table" payments (628a). This unsworn testimony by the prosecutor undoubtedly carried great weight with the jury be-

charge to the jury also stressed the crucial role of the questions of Glasser's finances and credibility (671a).

The jury apparently was quite skeptical of Glasser's veracity and it returned guilty verdicts on the charges on which the only evidence was Glasser's testimony 5/ only after it was given a "modified" Allen charge.

At a retrial a jury would be more than skeptical of Glasser's honesty on the witness stand. It would have be-

4/ (Footnote 4 continued)

cause of the prestige associated with the prosecutor's office, the natural assumption on the part of the jury that the prosecutor had facts available to him on which he based his assertion, and the "legalistic" nature of the prosecutor's claim. The jury, of course, had no competence or reason to challenge this "expert testimony" by the government's lawyer -- "expert testimony" which, as the subsequently discovered evidence disclosed, was totally untrue.

5/ The petitioners Hoff and Lageoles were convicted only of counts on which Glasser's testimony was the sole evidence of criminal acts.

fore it actual admissions and massive evidence of perjury and lies on numerous occasions concerning the "central issue" of Glasser's wealth. The government would be unable to use Mrs. Glasser as a corroborating witness for Glasser's honesty; indeed, the fact of Mrs. Glasser's massive perjury at the first trial would be material, relevant, and of great interest to the jury on the issue of the fact and motivation for Glasser's perjury. The United States Attorney at a new trial would be unable to vouch for Glasser's veracity and to claim that it would be sheer folly for Glasser to perjure himself. Nor could the judge at a new trial charge the jury with respect to Glasser's credibility and honesty in the relatively favorable manner in which the judge charged at the first trial. In short, there could be no question of Glasser's perjury and dishonesty; the only question would be its extent.

Nor would there be any doubt about the <u>motive</u> for Glasser to commit perjury, not only about the source of his wealth but also about his central allegations that he paid money to the defendants. For, given the huge amounts of cash Glasser received illegally from 1962 through 1971 and which were not reported on his income tax returns, it is clear that Glasser was subject to substantial <u>civil</u> tax fraud penalties which could

well amount to more than his entire fortune. This must have been a terrifying prospect for an elderly, retired man whose wife was and remains ill. Glasser had a clear motive, which readily would be understood by any juror, to attempt to attribute as much of the manufacturers' payments which he received as going to the union defendants instead. Similarly, Glasser had a clear motive to attribute as much as possible of his fortune as deriving from sources other than illegal and unreported payments, such as inheritance, gifts, sale of jewelry, etc. Given Glasser's past massive pattern of perjury and deception on this issue, even to the United States Attorney after trial, a jury would be hard put to believe the latest explanation.

CONCLUSION

The petition for writ of certiorari should be granted.

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